84-2155

No.

IN THE

Supreme Court of the United States

October Term, 1984

REGINA LEAVITT,

Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPEALS COURT, SUFFOLK COUNTY, COMMONWEALTH OF MASSACHUSETTS

ALAN M. DERSHOWITZ
232 Brattle Street
Cambridge, MA 02138
(617) 661-1965

LEWIS H. WEINSTEIN
FOLEY, HOAG & ELIOT
One Post Office Square
Boston, MA 02109
(617) 482-1390

Attorneys for Petitioner

QUESTION PRESENTED

Whether due process requires the grant of a new trial on a charge of perjury before the grand jury where, to prove an unspecific charge of contempt of the grand jury, evidence has been presented concerning various and sundry acts of misconduct and misbehavior vis-a-vis the grand jury, and where, on appeal, the contempt conviction has been reversed because the jury may have convicted on the basis of general misconduct.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OPINIONS BELOW

The opinion of the Appeals Court for the Commonwealth, not yet reported, appears in the Appendix hereto. (A-2) No opinion was rendered by the Suffolk County Superior Court, or by the Supreme Judicial Court for the Commonwealth of Massachusetts.

JURISDICTION

The judgment of the Appeals Court for the Commonwealth was entered on March 7, 1984. (A-35) A timely petition for rehearing was denied on March 21, 1984. A subsequent petition for further review to the Massachusetts Supreme Judicial Court was denied on May 3, 1984. (A-1) This Petition was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

INTRODUCTION

Petitioner in this tragic case, Regina Leavitt, is a seriously mentally ill mother of three, whose 12 year old son was recently involved in a near fatal accident resulting in potentially permanent brain, neurological and psychological harm. Although Leavitt's sentence is two years' imprisonment, the impact of that sentence upon her at this time may prove fatal to two people: herself and her dependent son. Uncontroverted medical evidence establishes that if Petitioner is incarcerated during this medical crisis, both she and her son will suffer irreparable harm, including the strong possibility of suicide on her part and permanent disability for her son. Accordingly, we respectfully urge

this Court to consider this petition with a sense of compassion as well as a sense of justice.

The petition raises a simple, but compelling, point: Where the state tries a defendant on charges of contempt of the grand jury and perjury before the grand jury, and where the appellate court reverses the contempt conviction because the jury heard and was permitted to convict on evidence of general misconduct towards the grand jury, must the case be remanded for retrial or, at minimum, resentencing on the perjury charge because of the unconstitutional spillover effect of the contempt case on the perjury case? Petitioner submits that the Due Process

Clause of the Fourteenth Amendment mandates an affirmative answer to that question.

STATEMENT OF THE CASE

Petitioner Regina Leavitt was charged by a special grand jury in separate indictments with one count of contempt of the special grand jury and two counts of perjury before the special grand jury. Petitioner was the president of Hospital Equipment Services (hereinafter "H.E.S."), a provider of durable medical equipment. She was called before the grand jury which was probing billing practices of the company on August 13, 1980 and December 1, 1980. The allegedly false statements which gave rise to the perjury charges were Petitioner's testimony before the special grand jury

on those dates that certain documents -- closed ledger cards -- were not maintained at the time a subpoena to produce those documents was served. The contempt charge was based on an unspecific purported "course of conduct" by Petitioner before the special grand jury.

The Commonwealth of Massachusetts, Respondent in this case proceeded to trial in Suffolk Superior Court on both the contempt and perjury indictments.

As to the perjury charges, the Commonwealth's witnesses claimed that on August 13, 1980 and December 1, 1980, Petitioner testified that H.E.S. had not routinely maintained "closed ledger cards" and that such ledger cards did not then exist. These cards allegedly would have provided evidence

of fraudulent dealings with Medicaid and Medicare, which the special grand jury was then investigating. The Commonwealth claimed that the closed ledger cards had been routinely maintained and did exist as of those dates. Several prosecution witnesses claimed to have seen the closed cards in the vault or on top of a file cabinet after the subpoena was received.

In addition, the Commonwealth attempted to prove "contempt" in failing to produce certain company records through the same testimony offered in support of its perjury claims as well as by further testimony that Petitioner had failed to produce certain adding machine tapes and current ledger cards. The Commonwealth

argued that the allegedly missing documents contained evidence of illegal billing practices under the Medicare and Medicaid programs, that is, billing twice for providing one service or "double billing."

Witnesses for the Petitioner explained that, contrary to the Commonwealth's claims, the closed ledger cards in question did not indicate double-billing or other willful violations of Medicaid or Medicare billing regulations. These closed ledger cards were routinely discarded during office renovations before the subpoena had been received. This was corroborated by H.E.S. clerks as well as by workers who had actually thrown out such cards. However, the information contained on the cards was

permanently recorded in original books of entry which were produced to the special grand jury. In addition, Petitioner testified that she had thrown away certain adding machine tapes at random, because they were scrap paper, but that the information contained on the tapes could also be found on ledger cards and in original books of entry, which had been produced to the special grand jury. Defense evidence also showed that Petitioner had produced to the special grand jury all current ledger cards allegedly containing credit balances, that she had cooperated at all times with the special grand jury, and that she had testified truthfully when she told the special grand jury that any records

that had not been produced had been routinely discarded before the subpoena was ever received.

The jury rendered verdicts of guilty on the contempt charge and on both counts of perjury. Petitioner was sentenced to two years' imprisonment.

Following her conviction, it was learned that Petitioner had been seriously mentally ill for approximately a year prior to her trial. The illness manifested itself by delusions concerning what would occur in prison. Petitioner twice attempted to commit suicide, and required supervision and psychiatric help. On April 15, 1982, Doctor Kinzel of McLean Hospital in Waltham, Massachusetts described Petitioner's psychiatric diagnosis as "major

depression, single episode, with paranoid features, with onset approximately a year ago, with physiological as well as emotional signs and symptoms leading to paranoid delusional panic and serious suicidal states..." Petitioner remained at McLean Hospital as an inpatient until July 19, 1982. Since then, she has remained under the care and supervision of McLean personnel as an out-patient. Doctors have since expressed concern that she will again attempt suicide if sent to prison. Thus, the seriousness of this petition is apparent, as is the imperativeness of allowing Petitioner all opportunities consistent with due process to contest a life-threatening prison sentence.

On direct appeal, the Appeals Court affirmed the judgment founded on the indictment for perjury, but reversed the judgment founded on the indictment for contempt. The contempt conviction was reversed on the ground that the trial court's instructions left the jury "free to consider acts of the defendant outside of the bill of particulars as misbehavior or improper conduct which constituted contempt..." (Appeals Court Opinion, page 13)

Petitioner promptly requested the Appeals Court to reconsider its decision insofar as that decision affirmed her perjury conviction. Petitioner noted that, in light of the Appeals Court's reversal of the contempt conviction, the very admission into evidence of acts not probative

under the bill of particulars poisoned Petitioner's entire trial. Petitioner requested a new trial on the perjury issue -- a trial free of the spillover of evidence improperly admitted, and evidence about which the jury was improperly instructed. Petitioner pointed out that due process, guaranteed by our Federal Constitution, mandates that a new trial be granted.

The petition for rehearing was denied by the Appeals Court, and a subsequent petition for further review by the Supreme Judicial Court was also denied.

Subsequent to these denials, Petitioner's 12 year old son was involved in a near fatal accident, resulting in brain injury, coma, neurological damage and devastating

psychological harm. Undisputed medical testimony establishes that without personal care by his mother, his chances for recovery will be seriously diminished.*

REASONS FOR GRANTING THE WRIT

The interests of justice would be served if this Court would grant the writ of certiorari and consider whether the Due Process Clause of the Fourteenth Amendment requires the granting of a new trial on charges of perjury before the grand jury where the conviction on a contempt charge involving a "course of conduct" which included the alleged perjury has been reversed and where the reversal was

---

* Petitioner's medical condition and that of her son are matters of record in this case. If requestsed to do so, Petitioner would make the relevant papers available to this Court.

necessary because the jury was permitted to convict on the basis of vague, generalized "misconduct," or "inappropriate" behavior by the Petitioner before the grand jury.

The trial in this case was fundamentally unfair and under the Due Process Clause, the conviction which resulted cannot be permitted to stand. Leavitt appeared before the grand jury on August 13, 1980 and December 1980. It was those two appearances which led to the contempt and perjury charges at issue here. The essence of the Commonwealth's claims against Leavitt -- embodied in its contempt indictment -- was that Mrs. Leavitt had engaged in a contumacious course of conduct before the grand jury. The indictment, however, did not set forth the

specifics of the allegedly contemptuous course of conduct. It charged only the generic crime of contempt* which, under Massachusetts law, encompasses various specific types of obstruction or interference with the course of justice, Opinion of the Justice, 301 Mass. 615, 618 (1931), including perjury, see, e.g., Miaskiewicz v. Commonwealth, 380 Mass. 150 (1980), or failure to comply with a court order, see, e.g., Furtado v. Furtado, 380 Mass. 137 (1980). As Mrs. Leavitt

---

* The indictment in full read: "On or about August 13, 1980 and on diverse other dates between August 13, 1980 and December 1, 1980 at Boston in the County of Suffolk, Regina Leavitt did intentionally, wilfully and knowingly impede, hinder, interfere and obstruct a duly sworn and constituted Suffolk County Special Grand Jury in the performance of its duty all in contempt of a judicial proceeding of the Superior Court of the Commonwealth of Massachusetts."

argued in her motion to dismiss the contempt charge, having to stand trial on this charge was a violation of her due process right to adequate notice of the charge against her. See Russell v. United States, 369 U.S. 749 (1962).

The Commonwealth's Bill of Particulars did nothing to cure this defect since, with the trial court's concurrence, the Commonwealth did not deem itself bound by the "particulars" there set forth. Finally, the trial court's instruction to the jury only compounded the harm. Those instructions permitted the jury to convict on the contempt charge if it found that Mrs. Leavitt had "misbehaved" or had engaged in "inappropriate conduct." Punishing as criminal such vague conduct would, of

course, be unconstitutional under both state and federal law. See Papachristou v. Jacksonville, 405 U.S. 156 (1972).

Because of the trial court's acceptance of a vague and broad theory of contempt based on "inappropriate" conduct, a great deal of evidence came before the jury which might have been relevant to the broad question of "misconduct" or "misbehavior" before the grand jury, including evidence relevant to the alleged perjury before the grand jury, but which was not relevant at all to any contempt charge properly before the jury. The conviction on the contempt charge was thus properly thrown out by the court on appeal.

The appellate court however erred in failing to consider the impact of the errors surrounding the indictment and trial on the improper contempt charge on the perjury counts. The court did determine that no errors in the perjury instruction similar to the error in the contempt instruction existed, but failed to consider that the impropriety of a trial for equivocal and cryptic misbehavior could have and must have spilled over and infected the trial on the perjury charge. Cf. United States v. DeCavalcante, 440 F.2d 1264, 1276 (3d Cir. 1971).

In effect, all of the evidence of generalized misconduct except that going to the specific misconduct of perjury became highly prejudicial evidence of other crimes or other bad

acts, the admission of which amounted to a denial of due process. Cf. United States v. Ragghianti, 527 F.2d 586 (9th Cir. 1975); United States v. Foutz, 540 F.2d 733 (4th Cir. 1976).

Where the jury was invited to and did convict the Petitioner because she had "misbehaved" or acted "inappropriately" -- because she was in some sense "bad" -- it strains credulity to believe that the jury completely abandoned that mode of analysis and found her guilty of the specific crimes of perjury charged only after carefully considering whether the Commonwealth had proved each of the elements of perjury beyond a reasonable doubt. Indeed, because of the overlapping nature of the broad contempt charge and the narrow charge

of perjury, it would have been virtually impossible for the jury to have undertaken that analytical task and to have performed it successfully.

Recognizing the fundamental unfairness of the contempt conviction, the Appeals Court reversed and set aside that judgment. But Mrs. Leavitt remains essentially where she was and <u>that</u> is the real fundamental unfairness which remains to be rectified.

CONCLUSION

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Appeals Court, Suffolk County, Commonwealth of Massachusetts.

Respectfully submitted,

Alan M. Dershowitz
232 Brattle Street
Cambridge, MA 02138
(617) 661-1965

Lewis H. Weinstein
Foley, Hoag & Eliot
One Post Office Square
Boston, MA 02109
(617) 482-1390

Attorneys for Petitioner

July 1, 1984

APPENDIX

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH, AT BOSTON, May 3, 1984

ORDER

It is hereby ORDERED, that the following Applications for Further Appellate Review be denied:

* * *

M-3057 COMMONWEALTH
vs.
REGINA LEAVITT
(Suffolk Superior Nos. 035978, -79; A.C. No. 83-207)
(Motion to File Application Late - allowed.)

* * *

By the Court,

Frederick J. Quinlan
Assistant Clerk

RELEASED MAR 7 1984

S.83-207 Appeals Court

COMMONWEALTH vs. REGINA LEAVITT

KASS, J. In the course of an investigation in 1980 of Medicaid[1] fraud, a special grand jury probed the billing practices of Hospital Equipment Services, Inc. (HES), a provider of hospital beds, wheel chairs, respiratory aids, walkers, and other durable medical equipment. Responding to a subpoena (after an unsuccessful motion to quash), Regina Leavitt, the president of HES, appeared before the grand jury on August 13, 1980, and

---

[1] Medicaid is a program of medical care and assistance established under the provisions of G. L. c. 118E, in compliance with Title XIX of the Social Security Act. See Pub. L. No. 89-97, 79 Stat. 343 (1965); 42 U.S.C. §§1396 et seq. (1976). See generally Sargeant v. Commission of Pub. Welfare, 383 Mass. 808 (1981).

December 1, 1980.[2] Those appearances led to the two indictments on which the defendant was convicted by a jury, convictions from which she brought this appeal. The first indictment charges that she did "intentionally, wilfully and knowingly impede, hinder, interfere and obstruct the grand jury" and, therefore, was in contempt of court; the second, that she committed perjury (G. L. c. 268, §1).[3]

As alleged by the Commonwealth in a bill of particulars, and as developed at trial, Leavitt's contempt consisted

---

[2] The Commonwealth says in its brief that Leavitt appeared before the grand jury on four occasions, but August 13th and December 1st are the dates upon which the indictment and a bill of particulars focus.

[3] The jury returned a third indictment for larceny, which was severed. Leavitt entered a plea of guilty in the larceny indictment on August 26, 1982, several months after the conclusion of her trial on contempt and perjury.

of (1) not delivering, and, indeed, destroying records of patients whose accounts were no longer active, the so-called "closed ledger cards"; (2) tearing inculpatory adding machine tapes from closed patient files before turning the files over to the grand jury; and (3) the nonproduction of certain current or "open ledger cards." During the presentation of the defense case, evidence also emerged of delayed -- and, hence, arguably obstructive -- production of a sales adjustment journal and a cash receipts journal.

Perjury, as alleged by the Commonwealth, occurred when Leavitt, while testifying before the grand jury on two different occasions, denied the existence of all but isolated closed ledger cards at the time she was served with the grand jury's subpoena. More

particularly, she said of the closed ledger cards: "We dumped them." Evidence was adduced by the Commonwealth at trial from which the jury could have found that Leavitt directed destruction of inculpatory closed ledger cards after she had received the subpoena from the grand jury.

The focus of the grand jury's investigation was the receipt and retention by HES of excess payments for equipment sold or leased. To that inquiry the closed ledger cards were highly relevant. As to each patient account, HES set up a ledger card on which charges and receipts were entered. If, as happened, a duplicate or excess payment was received for the account of a patient (generally from a third-party payor, such as Medicaid),

the overpayment would show on the patient's ledger card as a credit balance. Former bookkeepers at HES testified that they had been, with some frequency, directed by Leavitt to write off credit balances on accounts which had become inactive; i.e., HES would pocket the overpayments. It was the practice to indicate the closing of an individual account by drawing a double line and "zeroing out" the balance by writing off a debit or credit as the case might be. Thus, the closed ledger cards would display more prominently than any other record the writing off of a credit balance created by an excess payment.

We turn to the several issues on appeal. One requires reversal of the judgment of contempt. We affirm the judgment of perjury.

1. The sufficiency of the indictment for contempt. Leavitt argues that the indictment for contempt stated the crime charged in too broad, too generic a fashion; it failed to descend to particulars. See Russell v. United States, 369 U.S. 749, 765 (1962). Contempt of a judicial proceeding by means of interference and obstruction is not an unknown offense. Hurley v. Commonwealth, 188 Mass. 443, 446-448 (1905). Commonwealth v. McNary, 246 Mass. 46, 50-51 (1923). Opinion of the Justices, 301 Mass. 615, 618 (1938). Smith, Criminal Practice & Procedure §768 (2d ed. 1983).[4] As

---

[4] For discussions of the criminal nature of contempt of court and its common law antecedents, see Gompers v. United States, 233 U.S. 604, 610-611 (1914); Bloom v. Illinois, 391 U.S. 194, 201 (1968); United States v. Williams, 622 F.2d 830, 836-837 (5th Cir. 1980).

amplified by the particulars, the indictment adequately informed the defendant of the charges against her and gave her a reasonable opportunity to meet them. Dolan v. Commonwealth, 304 Mass. 325, 337-338 (1939) ("the complaint together with these particulars fully advised the defendant of the nature of the offense charged against him, and advised him of the facts relied on as constituting such offense in sufficient detail to give him reasonable knowledge of the grounds of the charge and reasonable opportunity to meet such charge.") Miaskiewicz v. Commonwealth, 380 Mass. 153, 156 (1980). See Commonwealth v. Hobbs, 385 Mass. 863, 869 (1982). It cannot be a coincidence that the trial which ensued focused precisely on the destruction or withholding of the

records to which the particulars had adverted. Technical nicety has not been demanded in the pleading of contempt. Miaskiewicz v. Commonwealth, supra at 156.

In a variation on the vagueness theme, the defendant suggests that a difficulty with a contempt indictment phrased in a general manner is that the special grand jury which handed up the indictment might have had one set of contumacious acts in mind while the Attorney General contemplated a quite different set when framing the bill of particulars. We have been referred to no grand jury minutes suggesting that such a variance in fact occurred and are not prepared to speculate that it did.

2. Whether the indicting grand jury was properly constituted. (a) More than one special grand jury investigated Medicaid fraud during the 1980-1981 period in which Leavitt's case developed.[5] A special grand jury convened November 15, 1979, in accordance with G. L. c. 277, §2A, as amended by St. 1979, c. 344, §29, was extended, upon application of the Attorney General, pursuant to G. L. c. 277, §1A, inserted by St. 1952, c. 494. Before that extended grand jury concluded its business, another special

---

[5] The record disclosed the convening of two special grand juries to investigate Medicaid fraud, and the defendant's brief refers to the grand jury before which she appeared as the "second special grand jury." The Commonwealth notes in its brief that three earlier special grand juries had been convened to investigate Medicaid fraud, thus making the indicting grand jury in this case the fourth special grand jury.

grand jury was convened to investigate Medicaid fraud. It was the latter grand jury before which Leavitt appeared. Pointing to the command in §1A that an extended grand jury shall serve until the investigation "has been completed and shall take up no new matter," Leavitt asserts that a special grand jury may not lawfully be constituted to investigate Medicaid fraud, albeit quite different suspected instances of it, for as long as another grand jury is working on Medicaid fraud, i.e., the same generic subject. She buttresses her contention with the second paragraph of §1A, which provides that a grand jury may be impanelled "whose duty shall include all business not then before the grand jury continued under authorization of this section."

The argument tortures a statutory provision designed to keep a special grand jury from sitting indefinitely into a requirement which accomplishes the opposite result. We think it plain that the prohibition in §1A against taking an extended grand jury into new matter does not preclude convening a new grand jury to consider a similar subject. Medicaid is a vast program involving a large number of providers of care, services, and, as in this case, durable equipment. Such is the scope of activity that the Attorney General has established a separate Medicaid Fraud Control Unit. For some sense of scale on which Medicaid providers are monitored, see Stornanti v. Commonwealth, 389 Mass. 518, 522-524 (1983). It is hardly plausible that any single special grand jury must sit

to exhaust the subject of Medicaid fraud or that investigation must be suspended until a grand jury looking into that general topic has been discharged. The new matter which an extended grand jury is to be spared is that which would lead to the presentment of an indictment based on a set of particular facts different from that considered by the grand jury prior to its extension. Cf. Commonwealth v. England, 350 Mass. 83, 84 (1966). Reciprocally, a successor grand jury is free to look into any matter not the subject of proceedings leading to a particular presentment before the prior grand jury. There was no showing that Leavitt's appearances were anything other than before the same special grand jury. If it were otherwise, it

is a circumstance as to which she has peculiar competence to provide the information.

(b) Perjury, as a statutory matter, occurs in the context of "a judicial proceeding or in a proceeding in a course of justice." G. L. c. 268, §1. Grand jury proceedings are, of course, judicial proceedings. See Commonwealth v. McNary, 246 Mass. at 50; Matter of Pappas, 358 Mass. 604, 613 (1971). The parties stipulated (among other things) that a special grand jury was created June 9, 1980; it issued a subpoena to Leavitt, requiring her to bring certain books and records.[6] It was nowhere

---

[6] The members of the trial jury also had before them the Attorney General's certificate of public necessity, the subpoena calling for Leavitt's appearance before the grand jury, an order of a Superior Court judge denying a motion to quash the subpoena, and a stipulation that Leavitt was sworn prior to testifying before the grand

proved, the defendant argues, that the grand jurors took their statutory oath (G. L. c. 277, §5). Therefore, the argument continues, it was not established that the special grand jury was lawfully convened and that false statements were made under oath in a judicial proceeding. To this strictissimi juris argument it is sufficient to answer that: on the face of the indictment for perjury the special grand jury presented it "on their oath"; the stipulation as to the creation of the special grand jury implies it was lawfully done; and there is a presumption that the acts of public bodies are regular and lawful. Robie v. Masachusetts Turnpike Authy., 347 Mass. 715, 725 (1964), and cases

---

jury.

there collected. Cf. Patry v. Liberty Mobilhome Sales, Inc., 15 Mass. App. Ct. 701, 703 (1983).

3. Evidence of double payments. Largely through the testimony of former bookkeepers of HES, the government introduced evidence at trial of retention of double payments or overpayments by HES. The defendant protests that this constituted erroneous admission of evidence of other crimes. Commonwealth v. Clifford, 374 Mass. 293, 298 (1978). Commonwealth v. Sawyer, 389 Mass. 686, 696 (1983). Commonwealth v. Grammo, 8 Mass. App. Ct. 447, 454 (1979). Those decisions rest on the principle that a defendant ought not to have to answer for offenses not set forth in the indictment. If, however, evidence of another offense is relevant to show

something other than bad character or propensity of the accused, it is admissible. Commonwealth v. Chalifoux, 362 Mass. 811, 815-816 (1973) (prior acts relevant to state of mind of victim and probative of crime charged). Commonwealth v. Caine, 366 Mass. 366, 370-371 (1974) (theft of gun one week before murder probative of means to commit crime and premeditation). Commonwealth v. Bradshaw, 385 Mass. 244, 269 (1982) (prior acts evidence of desperation). Commonwealth v. Kines, 5 Mass. App. Ct. 632, 634 (1977) (evidence of modus operandi). See also Commonwealth v. Sawyer, 389 Mass. 686, 698 (1983); Liacos, Handbook of Massachusetts Evidence 418 (5th ed. 1981).

Here the double payments and writing off of resulting credit balances bore materially on Leavitt's motives for lying about the closed ledger cards, which graphically disclosed how excess payments were cancelled by arbitrary debits, rather than returned. Those excess payments also explained destruction of closed ledger cards and the adding machine tapes, both of which highlighted the manner in which credit balances in favor of individual patients were eliminated by means other than refunds. See Commonwealth v. Borodine, 371 Mass. 1, 8, cert. denied, 429 U.S. 1049 (1976); Commonwealth v. St. Germain, 381 Mass. 256, 271 (1980). Once relevance is established, the decision whether, notwithstanding, the evidence of other wrongdoing[7] should be

---

[7] Leavitt, at the time or trial, had

admitted rests in the sound discretion of the judge. Commonwealth v. Hoffer, 375 Mass. 369, 373 (1978). Commonwealth v. Doyle, 5 Mass. App. Ct. 544, 548 (1977). There was no abuse of discretion. It would have been hard for the jury to understand the case without explanation of the relation of the closed ledger cards to evidence of retention of double or excess payments. Cf. Commonwealth v. Young, 382 Mass. 448, 463 (1981).

The defendant incorporates in her argument about the impropriety of admitting evidence of double payments a contention that the sting of this evidence would have been less damaging had the larceny charge been joined for

---

been convicted of no crime -- it was left to the jury to infer that the retention of double Medicaid payments wasn't cricket.

trial and had she, thus, been able to defend against the evidence of retention of double payments. The logic is not compelling. It was open to Leavitt to try to show that she was entitled to write off the credit balances and that the missing documents were immaterial. In any event, it is enough to say that Leavitt never moved to join the larceny indictment for trial under either Mass.R.Crim.P. 9(a)(3) or (4), 378 Mass. 859 (1979).

4. Admission of order refusing to quash grand jury subpoena. As probative on the issue of contempt, the trial judge admitted an order by another Superior Court judge who earlier had refused to quash or modify the grand jury's subpoena to Leavitt. In that order the judge had found that "[t]he materials summonsed are relevant

and material" to the investigation. Relying on Commonwealth v. McDuffee, 379 Mass. 353, 364-365 (1979), which held that materiality of false testimony in a perjury trial is a question for the jury, the defendant argues that admission of the court order erroneously took the issue of materiality away from the jury.

What that argument neglects is that the trial judge, immediately upon receipt of the court order in evidence, gave a limiting instruction to the jury explaining: that the order was admitted solely in relation to the charge of contempt; that the motion judge had used the word material in a sense different from that which the jurors were to consider in relation to the charge of perjury; and that he would instruct the jury later about the

meaning of the word "material" in connection with the perjury charge. The limiting instruction was somewhat diffuse, but the jury would have grasped the basic point, that the motion judge's order did not bear on the perjury aspect of the case. In his final instruction, the judge unmistakably put to the trial jury the issue of the materiality of Leavitt's statements to the grand jury:

> "And, lastly, was it material to the point at hand. And what does material mean? That it had relevancy, that it had probative value to the point in hand, to the inquiry that the Grand Jury, that the Special Grand Jurors were making. If the Commonwealth has satisfied you beyond a reasonable doubt as to each of those five essential elements [of perjury] and you are satisfied, and find that Regina Leavitt made a false statement under oath in a judicial proceeding that was wilful and voluntary and material to the issue at hand, then you shall find Regina Leavitt guilty as charged. If the Commonwealth has not so satisfied you as to each and all and every

> one of those five elements, then you shall find this defendant not guilty, and say no more."

5. Jury Instructions. We can dispose relatively quickly or one of the claims of error arising from the judge's charge to the jury. As a prelude to his discussion of presumption of innocence, the judge offered the following embellishment: "We have all heard that phrase. Some of us heard it more than a few years ago in civic[s] classes and grade school. We have heard it, sadly, in the national scandals of a few years ago and in the periodicals, presumption of innocence."

Had the judge stopped at that point there might be something to the defendant's argument that the judge had subjected the idea of presumption of innocence to derision and had burdened

the presumption of innocence by linking it to the Watergate defendants, many of whom were found guilty. But the judge did not stop at that point; rather he explained at length, and in the most unmistakable terms, the place of the presumption of innocence in our jurisprudence and the burden of the Commonwealth to establish each element of a crime charged beyond a reasonable doubt. Read in context, the judge's comments were a melancholy reflection that the concept of presumption of innocence had been trivialized by certain current events and attendant press coverage. His observation was set up in counterpoint to what he then instructed the jury, viz, that the presumption of innocence is a

fundamental right, to be taken seriously, and to be overborne only by proof beyond a reasonable doubt.

A second objection to the instructions, satisfactorily recorded on the record, properly protests that the trial judge gave the jury too expansive and vague a definition of the crime of contempt of the grand jury. Rather than confining himself to the particularized instances of interference and obstruction with which Leavitt had been charged and which were the subject of the trial, i.e., destruction of closed ledger card, removal and destruction of adding machine tapes, and the nonproduction of certain records, the judge repeatedly lapsed into abstractions which could have misled the jury. He spoke of contempt as undertaking "some act, some

course of conduct . . . any series of activities . . . The course of conduct that the Commonwealth must prove beyond a reasonable doubt is misbehavior.

"Now, when I use the term 'misbehavior', what I mean is that the Commonwealth must show conduct which is inappropriate, given the grand jury's function and purpose . . . ."

"Was the act or course of conduct, if any act or course of conduct there be, was that act or behavior, given all of the circumstances as you find them to have been, inappropriate to the function of the Special Grand Jury's investigation?"

To be sure, the judge told the jury that "the conduct proved must rise to the level of being a material obstruction." He explained that being somewhat tardy, making a disapproving

gesture such as spitting or thumbing the nose, while it might show disrespect, would not be the significantly impeding conduct which was charged. He never sharpened the focus of that portion of his charge, however, and returned to the theme of "a course of conduct in a manner inappropriate, given the duty and purpose of the Special Grand Jury."

Following completion of the charge, defense counsel objected to the generality of the instruction on contempt and also requested the judge to read the bill of particulars. The judge did so, but then (having been encouraged to do so by the prosecutor) undid what might have been a saving measure by adding:

"Other acts, if any other acts there be, any other conducts of the defendant may be utilized by you in the sense that it may, it may have -- and it may not -- if any other activities there be, it may have some probative value to the question of her contempt."

An effect of a bill of particulars is to restrict the scope of the indictment and the proof offered in support of it. Commonwealth v. Albert, 307 Mass. 239, 243 (1940). Commonwealth v. Iannello, 344 Mass. 723, 726 (1962). Commonwealth v. Hare, 361 Mass. 263, 270 (1972). Smith, Criminal Practice & Procedure §1296 (2d ed. 1983). After considering the instructions in their totality, we are of opinion that the jury were left free to consider acts of the defendant outside of the bill of particulars as

misbehavior or improper conduct which constituted contempt, for example: her instructions to bookkeepers in her company to write off excess payments or her delay in producing the sales adjustment and cash receipts journals. We think the charge was "substantially misleading as to a salient point" of the contempt portion of the case. Commonwealth v. Benders, 361 Mass. 704, 708 (1972). Cf. Commonwealth v. Brattman, 10 Mass. App. Ct. 579, 584 (1980). Contrast Commonwealth v. Perez, 390 Mass. 308, 313 (1983); Commonwealth v. Lutz, 9 Mass. App. Ct. 357, 361-362 (1980).

No imperfection attended the instruction on perjury. Accordingly, the judgment founded on the indictment for perjury is affirmed. The judgment

founded on the indictment for contempt is reversed and the verdict of guilty of contempt is set aside.

So ordered.

BROWN, J. (concurring). Collateral to this appeal is defense counsel's claim that, because of the defendant's mental illness, penal incarceration is an inappropriate -- indeed, dangerous -- consequence for her.[1] Counsel appears to suggest that this court should reverse Leavitt's conviction simply to facilitate the fashioning of a new sentence that will take into account "the reality . . . of . . . [her] mental illness."

The defendant may well be mentally ill, and in need of treatment. The Legislature has provided some measure of help for mentally ill prisoners.

---

[1] "[I]t is not a function of this court to review an otherwise lawful sentence which is within the limits of the applicable statutory provisions. Such a review, if it is available, is by the Appellate Division of the Superior Court acting pursuant to G. L. c. 278, §§28A-28C." Commonwealth v. Franks, 365 Mass. 74, 81 (1974).

such treatment is available now to this defendant as to any other convicted defendant. See G. L. c. 123, §18. Nevertheless, I am always amazed how those accused of so-called "white-collar" crime have the compelling need to state, at the moment when they stand convicted before the bar of justice, how and why their socio-economic status has prepared them so poorly for any period of incarceration. The point is often pressed that it is not in society's best interests to remove such "valuable" people from the mainstream of life, and place them in an environment populated only by "common" criminals. I have never been impressed by those arguments, as I see these defendants as what they are: convicted felons.

It is understandable that McLean Hospital or some other "facility of choice" would be a more desirable place to serve a sentence than one of the Commonwealth's correctional institutions. To be sure, neither M.C.I., Framingham, nor M.C.I., Walpole, has ever been mistaken for a country club. But that is not the way the system is supposed to work. Doctors, lawyers, judges, nursing home operators, merchants, politicians, and other professionals must not be encouraged to believe that there is one standard for them and another for those involved in so-called "street crime." A pen in the hand of a defrauding provider of services to the public may well be as dangerous and damaging to society as a gun in the hand of a robber. For our system to be perceived

as fair, as well as to operate fairly, we must not treat the two differently. Or, to put it more colloquially, "Don't do the crime, if you can't do the time."[2]

---

2 Ames, Baretta's Theme (Leeds Music Corporation and Dutchess Music Corporation, Melville, New York, 1975).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT FOR THE COMMONWEALTH

AT BOSTON, March 7, 1984.

IN THE CASE OF

COMMONWEALTH

vs.

REGINA LEAVITT

pending in the Superior

Court for the County of Suffolk

ORDERED, that the following entry be made in the docket, viz., --

> The judgment founded on the indictment for perjury is affirmed. The judgment founded on the indictment for contempt is reversed and the verdict of guilty of contempt is set aside.
>
> So ordered.

BY THE COURT,

/s/_____, Clerk

March 7, 1984

NOTE:

The original of the within rescript will issue in due course, pursuant to M.R.A.P. 23.